

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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ANTHONY D. STEVENSON,

Plaintiff,

v.

Civil Action No.  
1:10-CV-0607 (DEP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF:

MARGOLIUS LAW OFFICE  
7 Howard Street  
Catskill, NY 12414

PETER M. MARGOLIUS, ESQ.

FOR DEFENDANT:

HON. RICHARD S. HARTUNIAN  
United States Attorney for the  
Northern District of New York  
P.O. Box 7198  
100 S. Clinton Street  
Syracuse, NY 13261-7198

SATHYA OUM, ESQ.  
Special Assistant U.S. Attorney

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

## DECISION AND ORDER

Currently pending in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on February 1, 2012 during a telephone conference at which a court reporter was also present. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in his appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by

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<sup>1</sup> This matter has been treated in accordance with the procedures set forth in General Order No. 18 (formerly, General Order No. 43) which was issued by the Hon. Ralph W. Smith, Jr., Chief United States Magistrate Judge, on January 28, 1998, and subsequently amended and reissued by Chief District Judge Frederick J. Scullin, Jr., on September 12, 2003. Under that General Order an action such as this is considered procedurally, once issue has been joined, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

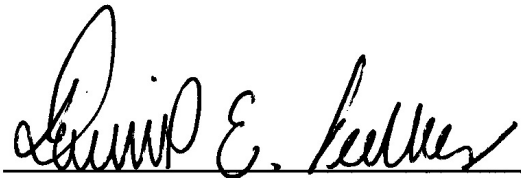
reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is directed to enter judgment, based upon this determination, dismissing plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: February 13, 2012  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ANTHONY D. STEVENSON,

vs.

10-CV-607

COMMISSIONER OF SOCIAL SECURITY  
-----x

Transcript of *DECISION* held on February 1, 2012,  
at the James Hanley U.S. Courthouse, 100 South Clinton Street,  
Syracuse, New York, the HONORABLE DAVID E. PEEBLES, Presiding.

A P P E A R A N C E S

For Plaintiff:  
(Via Telephone)

PETER M. MARGOLIUS, ESQ.  
7 Howard Street  
Catskill, New York 12414

For Defendant:  
(Via Telephone)

SOCIAL SECURITY ADMINISTRATION  
Office of Regional General Counsel  
Region II  
26 Federal Plaza - Room 3904  
New York, New York 10278  
BY: SATHYA OUM, ESQ.

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1 (Via Telephone:)

2 THE COURT: I've reviewed the briefs and I've  
3 considered the arguments of counsel. Let me, as a backdrop,  
4 briefly recount the history of this case.

5 An application was made on behalf of the claimant  
6 for childhood disability insurance and supplemental security  
7 income benefits on December 4, 2006, alleging an onset date  
8 of January 19, 1973, and, therefore, before the claimant  
9 reached the age of 22. His application was denied. A  
10 hearing was conducted on August 20, 2008, by the  
11 Administrative Law Judge Thomas Grabeel, resulting in a  
12 decision on September 17, 2008, denying the application for  
13 benefits. That determination was made final by the Social  
14 Security Appeals Council's decision on March 31, 2010, to  
15 deny review.

16 In his decision, as we've discussed, Judge Grabeel  
17 applied the well-known five-step test for determining  
18 disability, found that plaintiff, first, had not engaged in  
19 substantial gainful activity during any relevant period. He  
20 found that the plaintiff suffers from severe impairments,  
21 including the history of spina bifida, borderline  
22 intellectual functioning, obesity, and diminished vision; but  
23 found that none of those meet or equal, either singly or in  
24 combination, any of the listed presumptively disabling  
25 impairments.

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1           ALJ Grabeel then went to survey the evidence in the  
2 record and concluded by finding that, despite his conditions,  
3 plaintiff maintains the residual functional capacity -- or  
4 RFC -- to perform a full range of sedentary exertional  
5 activities, except that he has visual limitations in that he  
6 is precluded from performing work requiring depth perception  
7 of full field vision or perfect near and far visual acuity  
8 and also might have difficulty with learning and  
9 understanding and carrying out complex directions.

10           After noting that the plaintiff had no past  
11 relevant work at step four to be considered and recognizing  
12 the shifting of burdens at step five, ALJ Grabeel first  
13 surveyed the Medical-Vocational Guidelines for use as a  
14 framework which suggests that a finding of no disability and  
15 that was confirmed after he elicited testimony from a  
16 vocational expert through the use of hypotheticals.

17           I have applied the highly deferential standard of  
18 review that applies in this case. The plaintiff has raised  
19 three principal arguments. The first is that the ALJ  
20 improperly rejected the opinions of Dr. DiGiovanni expressed  
21 in his December 4th, 2007, assessment of the plaintiff's  
22 limitations as those of a treating physician, which should  
23 have been offered deference. I note, first, that,  
24 undeniably, the opinion of a treating physician regarding the  
25 nature and severity of an impairment is entitled to

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1 considerable deference, provided that it is supported by  
2 medically acceptable clinical and laboratory diagnostic  
3 techniques and is not inconsistent with other substantial  
4 evidence.

5 To determine the weight to be given to a treating  
6 source's opinion, the ALJ should have considered several  
7 factors, including, significantly, the length of the  
8 treatment; relationship and the frequency of examination; the  
9 nature and extent of the treatment relationship; the degree  
10 to which the medical source supported his opinion; the degree  
11 of consistency between the opinion and the record as a whole;  
12 whether the opinion is given by a specialist; and other  
13 evidence which might be brought to the attention of the ALJ.

14 Now, Dr. DiGiovanni is clearly a specialist, an  
15 orthopedic specialist. However, as far as I can see, this  
16 was the first and only time that Dr. DiGiovanni had seen the  
17 plaintiff and both his notes, his objective findings, and the  
18 overwhelming findings of other treating sources, including  
19 Dr. Oke, fail to support and are inconsistent with  
20 Dr. DiGiovanni's limited findings. The CAT scan that was  
21 administered, while showing spondylosis, showed no evidence  
22 of stenosis or other evidence of herniation.

23 Dr. Oke's notes, including at Pages 240, 243, and  
24 257 to 265 reflect a very different picture. He prescribed  
25 only Motrin, Aleve and Extra Strength Tylenol for the

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1 plaintiff; and I note that on February 15th, 2008, when he  
2 saw Dr. Oke, the plaintiff stated that he was feeling well.  
3 That is at the Administrative Transcript 240.

4 Dr. DiGiovanni's findings are also inconsistent  
5 with an exam administered on January 22nd, 2007, by Dr. Puri,  
6 an exam which could prove and provide substantial evidence.

7 So I find that the rejection of Dr. DiGiovanni's  
8 opinions was properly explained and well-supported.

9 The second point raised by the plaintiff concerns  
10 rejection of headaches, migraine headaches, as providing  
11 further limitation on the plaintiff's RFC.

12 As I indicated previously, first of all, migraine  
13 headaches were not mentioned as a limiting disability on  
14 plaintiff's application. That is at AT 141. It was not  
15 mentioned at the hearing when the plaintiff was asked about  
16 his limitations. That is at AT 49. It is only referenced in  
17 the medical history portion of two of Dr. DiGiovanni's  
18 reports. And plaintiff specifically and expressly denied  
19 having headaches to Dr. Oke at AT 240, 242, 257, 260, 262,  
20 and 264.

21 And getting beyond that, even assuming for the sake  
22 of argument, that the plaintiff does have headaches and does  
23 suffer from ongoing migraine headaches, there's no indication  
24 in the record that it has provided any limitation on his  
25 ability to perform work functions. Plaintiff is able to



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1 read; he plays board games; and no one has said that he is  
2 unable to perform work functions because of his migraine  
3 headaches.

4           Next, the third, and final question, concerns  
5 plaintiff's ability to perform the two jobs identified by the  
6 vocational expert in his testimony. Of course the, as a  
7 backdrop, application of the grid or the Medical-Vocational  
8 Guidelines in this case suggest a finding of no disability  
9 and supports the vocational expert's opinions.

10           Obviously, the plaintiff does suffer from  
11 non-exertional limitations, which could potentially erode the  
12 job base on which the Medical-Vocational Guidelines are  
13 based; and the ALJ, therefore, quite properly, sought the  
14 testimony of a vocational expert.

15           It's obviously a proper means of fulfilling the  
16 agency's burden at step five and the use of hypothetical  
17 questions to develop the vocational expert's testimony is  
18 proper and permitted, provided, of course, that the  
19 hypothetical utilized comprehensively and precisely includes  
20 each physical and mental impairment of the claimant, except  
21 as construed by the ALJ.

22           In this case, I find that the hypotheticals that  
23 were posed are defensible and are supported by substantial  
24 evidence in the record.

25           I understand the argument that has been raised

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1 concerning the GED level associated with the two jobs in  
2 question; but I do not find that the GED 3 designation is  
3 inconsistent with the finding of the need for the plaintiff  
4 to be able to carry out only simple low-stress entry-level  
5 job with simple instructions. The issue is addressed by one  
6 of my colleagues in *Cross against Astrue*, which is a case  
7 cited by defendant, where Judge Bianchini addressed the  
8 distinction between SVP and GED.

9 And, in my view, the plaintiff is capable of  
10 performing the functions of the two jobs identified by the  
11 vocational expert. He, first of all, again, he did not list  
12 his mental condition as any -- as limiting his ability to  
13 work in his application. His father and he expressed  
14 surprise that he was even being tested in that regard. He  
15 has a high school degree and took mostly regular coursework.  
16 He has a full scale IQ of 81.

17 And, so, I find that there is no evidence  
18 suggesting that the plaintiff cannot meet the requirements of  
19 the two jobs identified by the vocational expert in this  
20 case.

21 In sum, I find that the Administrative Law Judge in  
22 this case applied proper legal principles and his decision in  
23 the case is supported by substantial evidence.

24 So I will issue an order granting defendant's  
25 motion for judgment on the pleadings confirming the

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1 Commissioner's determination and dismissing plaintiff's  
2 complaint; and you'll get a short form order, which will  
3 attach to it the transcript of my decision.

4 I appreciate from counsel the excellent briefing  
5 and oral argument today which has been very helpful for me,  
6 frankly; and I look forward to working with you in the  
7 future. Have a good day.

8 DEFENSE COUNSEL: Thank you, your Honor.

9 SPEAKER 2: Thank you, your Honor.

10 (Proceedings were adjourned.)  
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C E R T I F I C A T I O N

I, DIANE S. MARTENS, Registered Professional Reporter, DO HEREBY CERTIFY that I attended the foregoing proceedings, took stenographic notes of the same, that the foregoing is a true and correct copy of same and the whole thereof.

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DIANE S. MARTENS, FCRR